



ASSOCIATION OF CONSULTING ACTUARIES

Association of Consulting Actuaries Limited · First Floor (129) · 40 Gracechurch Street · London · EC3V 0BT
Tel: +44 (0)20 3102 6761 · Email: acahelp@aca.org.uk · Web: www.aca.org.uk

9 June 2021

caxtonhouse.dwptransferegulations@dwp.gov.uk

Kirsty Knight
Department for Work and Pensions
Policy Group
Private Pensions and ALB Partnerships
Zone A, Third Floor South,
Quarry House,
Leeds LS2 7UA

Dear Kirsty

Consultation on The Occupational and Personal Pension Schemes (Conditions for Transfers) Regulations 2021

I am writing on behalf of the Association of Consulting Actuaries in response to the consultation on the above regulations. Our thoughts are set out in the Appendix to this letter.

We welcome any effort to limit the opportunity for pension scams to succeed and we acknowledge that this proposed limitation on the statutory right to transfer has been a long time coming and has benefitted from the input of a number of stakeholders. Nevertheless, we find the proposed system complex with the potential to add risk to trustees of transferring schemes. It is therefore essential that this reform is accompanied by detailed guidance from the Pensions Regulator and that sufficient time is given to administrators, on behalf of their trustee clients to adapt their processes to this new system.

On the time to adapt issue it would also be useful if the Pensions Ombudsman could give a clear steer in this respect given his recent Determination in respect of the Regulator's 2013 publication of its 'Scorpion' scams guidance. It would also be useful if the Ombudsman could acknowledge, when considering any future member complaints once the new system has bedded down, the due diligence required of trustees which may well result in processing times being elongated.

We hope that you find the contents of this letter of assistance. We would be happy to discuss them further if that is helpful. In that event, please contact me on 01372 733763 or at peter.williams@aon.com.

Yours faithfully

Peter Williams

Chairman, Pension Schemes Committee

On behalf of the Association of Consulting Actuaries Limited

Association of Consulting Actuaries Limited
Registered Office: 10 St James Road · Wokingham · RG40 4RT
Registered in England No. 10184138
Registered under the Data Protection Act ZA114526

The Occupational and Personal Pension Schemes (Conditions for Transfers) Regulations 2021

Specific consultation questions

First condition

- 1. Please provide details of any additional types of receiving scheme to which transfers should proceed without additional checks, including how they can be identified for the purposes of the regulations.**

We cannot immediately think of other scheme types, capable of being defined in legislation, that should be treated under the First condition, but we note that a destination of choice for many DB transfers is SIPPs authorised and regulated by the Financial Conduct Authority and operated by entities that are not insurers.

Second and third conditions

- 2. To what extent is the evidence requirement set out in the regulations to demonstrate an 'employment link' sufficient and how could it be strengthened?**

Our understanding is that the Second condition is intended to thwart transfers involving bogus employment relationships, such as that in the 2016 Hughes vs Royal London case. We suspect that the Second condition will be little used as the nature of pension scams has moved on.

The employment link evidence required is, on the face of it, pretty strong and when taken together with the "balance of probabilities" trustee assessment, appears to act as a sufficient safeguard, as the assessment allows the trustees to look through the evidence supplied and choose to assume that it is bogus. However, there is a need for guidance to explore this area because the trustees will not be able to deny transfer to the proposed destination if, on balance, they conclude that the employment link is met.

Draft regulation 4(3)(d) makes clear that the member must contribute to the scheme, as one of the conditions for the employment link to be met. But when it comes to supplying the evidence draft Regulation 5(4)(a)(i) refers to contributions made by, or on behalf of, the member. We see no reason why non-contributory schemes should fail the Second condition and suggest that you adjust draft regulation 4(3)(d) to that end.

We don't understand the logic for allowing the existence of a previous transfer to the same scheme within the last twelve months to bypass the employment link evidence. This is also found in the third and fourth conditions and in all three cases is not explained in the consultation document. This would seem to enable, for at least the first year of these regulations, a dubious transfer made under the old regulations to validate an equally dubious transfer under the new regulations, with the trustees powerless to stop the second transfer.

We found the reference in Regulation 5(4)(a) to the schedule of contributions and payment schedule to be confusing. These documents are forward-looking and must contain prescribed

information. It seems to us that the backward-looking information required by virtue of Regulation 5(4)(a)(i) and (ii) is unnecessary and should be removed.

3. How could the evidence requirement for ‘residency link’ work in practice?

We are unable to assist with this issue. We agree that it is not possible to be specific as to the evidence required as it is likely to vary by financial jurisdiction. We have a concern that the trustees will not be in a position to judge whether the ‘formal residency documentation’ supplied is bona fide. As such it may be very difficult for the trustees to reach a “balance of probabilities” assessment.

Fourth condition

4. How should the ‘red flags’ as set out in the regulations work in practice?

We note that the regulations enable but do not compel the trustees to seek flag information from the member. We think this is right. There are likely to be many proposed receiving schemes that are not scam risks, but which do not meet any of the first three conditions. Trustees will need guidance, from the Pensions Regulator, as to what they need to do when operating under the Fourth condition. There will be many cases where there is no scam risk (and so no evidence is needed), there will be others where the trustees can reach a “reasonable belief” that a red flag exists through prior knowledge and industry intelligence sharing and there will be others where information from the member will be needed in order to assist the trustees reach their decision.

The guidance needs to explore what it takes to have a “reasonable belief”. It would appear that having a suspicion is not enough. If the trustees have concerns but not to the extent that the red flag is raised it seems that they will not be able to deny the transfer and so potentially put themselves at risk of member comeback should the receiving scheme turn out to be a scam.

The red flags focus on the transfer process. The wording for each of them needs to be finalised with care because, as we read it, even if the trustees have no scam concerns and choose not to seek flag information, if an aspect of the proposed transfer meets a red flag criterion the trustees will have no choice but to raise the flag and so halt the transfer. For example, a legitimate incentive exercise being conducted by the employer of the transferring scheme could possibly raise red flag (e). Conversely there could be aspects of the transfer process pointing to a potential scam that don’t fall within any of the red flags as drafted leaving the trustees powerless to halt the transfer – for example, it appears that unlicensed introducers would not themselves result in red flag (c) being raised.

We note that the regulations do not require the trustees to tell the member which red flag has been raised. Guidance may be needed as to what trustees should tell the member when one or more red flags are raised.

5. How should the ‘amber flags’ as set out in the regulations work in practice?

The amber flags, which focus on investment and charges, appear to be harder to operate than the red flags as they are much more dependent on interpretation, despite the useful definitions of a number of terms used. Guidance will be essential and even with comprehensive guidance trustees could be put to a lot of work in order to decide whether or not an amber flag exists. There is also a clear risk that the meaning of the various amber terms varies over time. We wonder whether a more streamlined mechanism can be made available under which trustees can

require the member to take guidance, rather than have to reach a judgment as to whether or not an amber flag exists.

A further difficulty with amber flags is that they may often be raised where there are clear scam concerns – in recent times it has been the nature of the proposed investment that has been the concern and which subsequently gives rise to the loss. However, the member does not lose the statutory right to transfer in amber situations so long as the guidance is taken. Unless the MaPS guidance session is sufficiently persuasive, the scam will still take place.

A potential difficulty with both red and amber flags is that once a “reasonable belief” has been reached about the existence of a flag, the trustees have no choice but to raise it. For example, the receiving scheme may well include overseas investments (such as the ability to invest in companies listed on US markets) and so it seems that the amber flag has to go up even though there may be absolutely no scam concerns. Fees at the high end of the normal range of fees could also result in an amber flag being unnecessarily raised.

We note that the regulations do not require the trustees to tell the member which amber flag has been raised. Guidance may be needed as to what trustees should tell the member when one or more amber flags are raised. It is also not clear whether the trustees should inform the guidance provider of the flags they have raised.

6. Do you have any views on how the requirement to take guidance can work in practice when the pension saver has already taken financial advice?

Our understanding of the purpose of the guidance is to provide a mechanism through which the member can think again. The guidance is distinct from the financial advice that the member may well have had to take in the first place.

7. Annex 3 sets out the proposed list of standard questions that trustees and schemes managers should use to help determine the presence of red or amber flags. Do these questions provide a comprehensive list, which if any questions are not needed and what other questions should be included?

This looks to be a good draft and we leave it to others with expertise in detecting scam risks to respond.

Disclaimer

This document is intended to provide general information and guidance only. It does not constitute legal or business advice and should not be relied upon as such. Responding to or acting upon information or guidance in this document does not constitute or imply any client /advisor relationship between the Association of Consulting Actuaries and/or the Association of Consulting Actuaries Limited and any party, nor does the Association accept any liability to any person or organisation relating to the use of such information or guidance.